CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 9

No. 686 35

THE STATE OF OHIO ON THE RELATION OF JOHN C. POPOVICI, VICE CONSUL OF ROUMANIA, PETITIONER,

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM, AND EDWIN W. DIEHL, JUDGES OF THE COURT OF COMMON PLEAS OF STARK COUNTY, OHIO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED FEBRUARY 8, 1929

CERTIORARI GRANTED MARCH 11, 1929

(33,995)

(33,995)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 686

THE STATE OF OHIO ON THE RELATION OF JOHN C. POPOVICI, VICE CONSUL OF ROUMANIA, PETITIONER,

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM, AND EDWIN W. DIEHL, JUDGES OF THE COURT OF COMMON PLEAS OF STARK COUNTY, OHIO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

INDEX

	Page
Proceedings in supreme court of Ohio	1
Docket and journal entries	1
Judgment	2
Petition for prohibition	3
Præcipe for summons	6
Demurrer to petition	7
Opinion, Marshall, J.	8
Order allowing certiorari	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 5, 1929

No. 21,357

IN THE SUPREME COURT OF THE STATE OF OHIO.

Transcript of Docket and Journal Entries.

TITLE.

The State of Ohio ex rel. of John C. Popovici, Vice Consul of Roumania, 315 Bulkley Bldg., Cleveland, Ohio,

VS.

Abram W. Agler, Charles Krichbaum, Edwin W. Diehl, Judges of the Court of Common Pleas of Stark County, Canton, Ohio.

ACTION.

In Prohibition.

ATTORNEYS.

For Plaintiff.

MALCOLM Y. YOST, Cleveland, Ohio.

For Defendants.

HARRY NUSBAUM, Canton, Ohio.

Memoranda of Pleadings, &c., filed, writs issued, judgments, orders and decrees.

1928

Sept. 22. Petition for writ of prohibition filed. Precipe for issuance of summons filed. Fifteen copies of petition filed. Summonses issued for defendants to Sheriff of Stark Co. Ohio, returnable October 1, 1928, sent by registered mail, Post Office receipt No. .....

Oct. 2. Writ returned and filed, endorsed: "Received this writ September 24, 1928, at 10 o'clock A. M. and pursuant to its command, on September 27, 1928, I notified the within named defendant, Abram W. Agler, Judge of the Court of Common Pleas of Stark County, Ohio, by delivering to him personally, a true and certified copy of this writ with all the endorsements thereon, on September 29, 1928. I also notified the within named defendant, Chas. Krichbaum, Judge of the Court of Common Pleas of Stark Co., Ohio by delivering to him personally, a true and certified copy of this writ with all the

endorsements thereon, on September 24, 1928. I also notified the within named defendant, Edwin W. Diehl, Judge of the Court of Common Pleas of Stark County, Ohio, by delivering to him personally, a true and certified copy of this writ with all the endorsements thereon. Fees, $2.07, Edw. Gibson, Sheriff, by H. G. Notter, Deputy."

Oct. 15. Demurrer to petition, briefs on demurrer, (9) and acknowledgment filed.

Oct. 22. Demurrer to petition (3) filed.

Nov. 3. Briefs of relator on demurrer and proof of service filed.

Dec. 26. Demurrer to petition, sustained. Journal 31, p. 518.

Dec. 26. Writ denied. Journal 31, p. 529.

Jan. 2, 1929. Certified copy of entry sent Attorney for Relator.

Transcript of Journal Entries.

Wednesday, December 26, 1928. It is ordered by the Court that this demurrer to the petition be and the same is hereby sustained. Journal 31, page 518.

Wednesday, December 26, 1928. This cause came on to be heard upon the demurrer to the petition and was argued by counsel. On consideration whereof it is ordered and adjudged that said demurrer be and the same hereby is sustained, for the reasons stated in the opinion filed in this case. And said relator not desiring to plead further, it is therefore ordered and adjudged that the writ of prohibition prayed for be, and the same hereby is denied.

It is further ordered and adjudged that the relator pay the costs herein, taxed at $....., for which execution is awarded. Journal 31, page 529.

SUPREME COURT OF OHIO

State of Ohio, City of Columbus, ss.

I, Seba H. Miller, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the Records of said Court. And I further certify that true copies of the petition and demurrer filed in said case No. 21357 State ex rel. Popovici, Vice Consul, etc. v. Abram W. Agler, et al., are hereto attached, together with the briefs on said demurrer.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 7th day of January, A. D. 1929.

SEBA H. MILLER,

(Seal) *Clerk of Supreme Court of Ohio.*

No. 21,357.

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO on the relation of
JOHN C. POPOVICI, Vice Consul of Roumania,
315 Bulkley Bldg., Cleveland, Ohio,
Relator,
vs.
ABRAM W. AGLER, CHARLES KRICHBAUM, EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
Defendants.

Petition for Prohibition.

MALCOLM Y. YOST,
Engineers National Bank Bldg.,
Cleveland, Ohio,
Attorney for Relator.

No. 21,357.

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO on the relation of
JOHN C. POPOVICI, Vice Consul of Roumania,
315 Bulkley Bldg., Cleveland, Ohio,
Relator,
vs.
ABRAM W. AGLER, CHARLES KRICHBAUM, EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
Defendants.

Petition for Prohibition.

(Filed in the Supreme Court Sept. 22, 1928.)

Relator herein for his cause of action says that he is vice-consul for the Kingdom of Roumania, being duly accredited by the Government of the Kingdom of Roumania, to the Government of the United States, and

having been duly and regularly recognized and accepted by the Government of the United States as Vice-Consul of Roumania, and being stationed by the Roumanian Legation, at Cleveland, Ohio, where he is now residing and representing said Roumanian Government, as vice-consul. And relator further says that at all times hereinafter set forth in this petition, he was representing said Roumanian Government as vice-consul aforesaid. That relator is an alien and a citizen of the Kingdom of Roumania. That said defendants are Judges of the Court of Common Pleas of Stark County, Ohio.

Relator further says that on the 26th day of May, A. D., 1927, he was summoned, at the suit of Helen Popovici, to answer in the Court of Common Pleas of Stark County, Canton, Ohio, said Court being presided over by said defendants. That said action which relator was summoned to answer is an action in the nature of divorce and alimony, and bears the number 50050 in said Court of Common Pleas. That in response to said summons, relator appeared in said Court and objected to and denied its jurisdiction in said action.

Relator further says that said Court has no jurisdiction whatsoever of said case, by reason of Article 3, Section 2, of the Constitution of the United States as follows:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, to all cases affecting ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party, to controversies between two or more States; between a State and citizen of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

and by reason of Section 258 (8) of the United States Judicial Code, U. S. Compiled Statutes of 1918, Section 1233 as follows:

> "The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the Courts of the several states.

(8) In all suits and proceedings against ambassadors or other public ministers, or their domestics or domestic servants, or against consuls or vice-consuls."

Relator further avers that, in spite of said Constitution and Laws of the United States of America, defendants overruled the objection of this relator and proceeded to enter against him an order for temporary alimony, and unless prohibited from so doing, will restrain relator of his liberty, by means of contempt proceedings, and will proceed to hear and determine said action, although said Court of Common Pleas has no jurisdiction whatsoever in said action, and any judgments or orders issued thereon are null and void. That relator never, at any time, waived the lack of jurisdiction of said Court, nor consented to, or submitted to its jurisdiction, but always has denied and continues to deny that said Common Pleas Court of Stark County, has any jurisdiction whatsoever to hear said proceedings or to issue any decrees, orders or judgments pursuant thereto.

Relator says that he has no adequate remedy at law, that error proceedings or appeal proceedings in said original action will furnish him with no relief, inasmuch as said Common Pleas Court will commit him for contempt pending such error proceedings or appeal, and restrain him of his liberty, although without jurisdiction in said action.

WHEREFORE, your relator prays that a writ of prohibition may be issued from this Court prohibiting said defendants from trying said cause, and from executing or enforcing any decrees, judgments or orders heretofore entered therein against this relator, and generally from any further exercise of jurisdiction in said cause.

MALCOLM Y. YOST,
Attorney for Relator.

State of Ohio, Cuyahoga County, ss.

JOHN C. POPOVICI, being first duly sworn, says that he is the relator herein, and that the statements and allegations in the foregoing petition contained, are true as he verily believes.

JOHN C. POPOVICI.

Sworn to and subscribed before me this 17th day of September, A. D. 1928.

HARRY F. PATTIE,
Notary Public.

(Seal)

No. .....

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO on the relation of
JOHN C. POPOVICI, Vice Consul of Roumania,
315 Bulkley Bldg., Cleveland, Ohio,
Relator,

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM, EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
Defendants.

Precipe.

To the Clerk of Supreme Court:

Please issue summons with alternative writ in the above entitled action, addressed to the Sheriff of Stark County, Ohio, and returnable according to law. Endorse thereon "Action in Prohibition."

M. Y. YOST,
Attorney for Relator.

No. 21,357.

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO on the relation of
JOHN C. POPOVICI, Vice Consul of Roumania,
315 Bulkley Bldg., Cleveland, Ohio,
Relator,

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM, EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
Defendants.

Demurrer to Petition.

The respondents, Abram W. Agler, Charles Krichbaum and Edwin W. Diehl, as Judges of the Court of Common Pleas, Stark County, Ohio, demur to the petition for a writ of prohibition herein for the reason and because:

First. That the petition herein does not state facts to constitute a cause of action.

Second. That the said petition does not set up facts sufficient to entitle the plaintiff to the writ prayed for.

Third. That the petition is wholly insufficient in law to justify this court to hear, try, and determine the matter involved.

Wherefore these respondents having shown cause, ask for a dismissal of the petition with costs.

Respectfully submitted,

HARRY NUSBAUM,
Attorney for Respondents.

No. 21,357.

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, EX REL. JOHN C. POPOVICI,
Vice Consul of Roumania,
Relator,

VS.

ABRAM W. AGLER, CHARLES KRICHBAUM and
EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
Defendants.

Opinion of the Supreme Court of Ohio.

Inasmuch as the federal courts has disclaimed altogether any jurisdiction upon the subject of divorce or for the allowance of alimony either as an original proceeding in chancery or as an incident to a divorce, prohibition will not lie to prevent the courts of this state which have jurisdiction of the subject-matter of divorce and alimony, from hearing and determining a suit for divorce or alimony or both against a consular representative accredited by a foreign government to the government of the United States and recognized and accepted by the government of the United States, who is stationed in the state of Ohio.

(No. 21357—Decided December 26, 1928)

In Prohibition

The facts are stated in the opinion.

MR. MALCOLM Y. YOST, *for relator.*

MR. HARRY NUSBAUM, *for defendants.*

MARSHALL, *C. J.*

This suit was filed in this court invoking the original jurisdiction of the court, praying a writ of prohibition to prohibit the defendants from trying a cause pending in the Court of Common Pleas of Stark County, Ohio. The petition recites that Popovici is a vice consul for the kingdom of Roumania, duly accredited by the government of the kingdom of Roumania to the government of the United States, and recognized and accepted

by the government of the United States as such vice consul, and that he is stationed by the Roumanian legation at Cleveland, Ohio, where he now resides and represents said Roumanian government as vice consul. It further recites that he is an alien and a citizen of the kingdom of Roumania.

It is further recited that on May 26, 1927, Helen Popovici his wife filed a suit in the Common Pleas Court of Stark County, Ohio, praying divorce and alimony. Relator as defendant in that cause objected to the jurisdiction of the court, but the court overruled the objection and made an order for temporary alimony, and, according to the allegations of the petition, will, unless restrained by this court, enforce that order by contempt proceedings, with possible restraint of his liberty. Though it was not alleged in the petition, it was conceded as a fact during the argument of this cause that Helen Popovici was at the time of the marriage a resident of Stark County, Ohio, and that the marriage was contracted and consummated in Canton, Stark County, and that the marriage therefore acquired a legal domicile in that county. The proceedings were regular in all respects and except for the official position of relator as a vice consul no question would arise.

Relator claims the protection of Section 2 of Article III of the Constitution of the United States, which provides, in part, as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls * * *.
>
> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

These are the only provisions found in the federal constitution having any bearing upon this subject.

He also invokes the aid of paragraph 8 of Section 256 of the United States Judicial Code, Section 1233 U.

S. Compiled Statutes of 1918, as amended March 3, 1911, as follows:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States; * * *
>
> "Eight. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls."

In any ordinary action against the accredited representatives of a foreign government, relating to causes over which federal courts have well recognized jurisdiction, and where they are in fact exercising such jurisdiction, it is not doubted that Section 256 of the Judicial Code, or any other enactment on that subject which congress has the constitutional authority to enact, would be controlling, and entirely exclude jurisdiction of the state courts. It may be doubted whether congress would have the power to confer upon the federal courts exclusive jurisdiction, or any jurisdiction, over causes in which the domestic relations are involved. It has been definitely and repeatedly decided by the federal courts that under existing legislation those courts may not entertain jurisdiction over causes affecting the domestic relations. The earliest declaration, upon that subject is found in *Barber v. Barber,* 21 Howard 582:

> "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo,* or to one from bed and board."

That case was decided in 1858. There was a divided court, but the members of the court at that time differed only upon the grounds of rejecting the jurisdiction, they being unanimously of the opinion that jurisdiction could not be entertained of that class of cases. In 1882 the Circuit Court of the Southern District of New York, in *Johnson v. Johnson,* 13 Fed. 193, remanded of its own motion a divorce case which had been removed to that court from the state court. The Circuit Court of the Northern District of Illinois took similar action in the case of *Bowman v. Bowman,* 30 Fed. 849. The same doctrine was applied in *The Case of Burrus,* 136 U. S. 586, in which a writ of habeas corpus was applied for to

restore a son to the custody of his father, unlawfully detained by his grandparents. Mr. Justice Miller declared in the opinion, at page 593:

> "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States."

In *Simms v. Simms,* 175 U. S. 162, the court had under consideration an appeal from a decree of the Supreme Court of the territory of Arizona. While the court in that case entertained jurisdiction of an appeal from the territorial court, Mr. Justice Gray, in the opinion, at page 167, made the following observation:

> "In support of the motion to dismiss this appeal because the decree below concerned divorce and alimony only, the appellee relied on *Barber v. Barber,* 21 How. 582. In that case, a majority of this court held that a wife who had obtained against her husband, in the courts of the State of their domicile, a decree, divorcing them from bed and board and awarding alimony to her, might sue the husband for such alimony in a Circuit Court of the United States held in a State in which he had since become domiciled. Mr. Justice Wayne, in delivering judgment, said: 'We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or as an incident to a divorce *a vinculo,* or to one from bed and board.' 21 How. 584. And from that proposition there was no dissent. It may therefore be assumed as indubitable that the Circuit Courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court. Within the States of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not to the laws of the United States. *In re Burrus,* 136 U. S. 586, 593, 594."

In *De la Rama v. De la Rama,* 201 U. S. 303, a similar declaration was made by Mr. Justice Brown, at page 307 of the opinion.

If any further citation of authority is necessary to be shown to establish the principle that the federal courts will not entertain jurisdiction of divorce and alimony cases, that authority may be found in the experience of Helen Popovici. She brought her action in the District Court of the United States for the northern district of Ohio, and a motion to dismiss was filed by relator in this case, and, after full consideration, and rendering an elaborate opinion, the court dismissed the petition on the ground that it had no jurisdiction over an action for divorce and alimony. It would seem, therefore, that if the state courts cannot entertain jurisdiction of this cause Mrs. Popovici has one of two alternatives, either to continue to occupy the status of a deserted wife, with the attendant obligation of rearing, supporting and educating her infant child, or to go to Roumania and invoke the jurisdiction of the courts of that kingdom to obtain a legal separation, and support for herself and child. The federal constitution did not definitely and in terms give to the federal courts exclusive jurisdiction over all controversies in which a foreign representative is a party. It provided that the jurisdiction of the federal courts should extend to such causes, and further that the Supreme Court of the United States should have original jurisdiction. In neither event was it declared to be exclusive. It was left to congress to determine to what extent the jurisdiction should be made exclusive, and, acting upon the authority given, congress in the judicial act of September 24, 1789, gave to the district courts of the United States exclusive jurisdiction of all suits against consuls, except in certain instances with which we are not now concerned. In *Davis v. Packard*, 7 Peters 276, it was held that that portion of the act was constitutional. The law remained unchanged until the act of February 18, 1875, whereby that portion of the earlier act was repealed, and for thirty-seven years there was no statutory provision which in terms made the jurisdiction of the courts of the United States exclusive of the state courts in suits against consuls or vice consuls. The act of March 3, 1911, again restored the exclusive jurisdiction of the district courts of all civil cases against consuls. Since March 3, 1911, it is unquestioned that the jurisdiction of the federal courts is exclusive of the jurisdiction of state courts in all causes affecting consuls, in so far as the federal courts themselves have jurisdiction over the subject-matter of the controversies. Our sole inquiry in the instant case is

whether the state courts are excluded from jurisdiction over those controversies affecting ambassadors, other public ministers and consuls, where the federal courts disclaim jurisdiction entirely. It is at least significant that congress, having the right to assert exclusive jurisdiction in the federal courts, did not exercise that right for a period of thirty-seven years. It is equally significant that congress has not at any time established a special court, or given jurisdiction to the district courts over causes involving domestic relations affecting foreign ministers and consuls. Whether this omission has been due to a willingness to leave all matters affecting the domestic relations to the state courts, or whether the omission is for the reason that such jurisdiction would be an unconstitutional usurpation of power, we need not at this time inquire. It is sufficient to say that at this time Mrs. Popovici is wholly without redress, unless her cause can be heard and decided by the courts of this state. The constitutional provision had its origin in the law of nations, and, while its wisdom is undoubted, there must necessarily be some limitations upon its application. That there are certain well-defined limitations and exceptions is fully established by the authorities. Unfortunately no cause has ever come before the federal courts involving the right of a state court to hear and decide a suit for divorce and alimony affecting a foreign consul. In the instant case it must be borne in mind that an alien took up his abode in the city of Canton, contracted marriage with a resident of Ohio, with the incidental obligations which that marriage involved, including support of wife and support, maintenance and education of a child. The wife and child are not only the beneficiaries of those obligations, but by reason of the breach of the marriage contract she is entitled to the restoration of her former status so far as lies in the power of the courts to grant. The relator having invoked the laws of Ohio to contract a valid marriage should not lightly be heard to deny the right of the other party to the contract to invoke the remedial laws of the same state to compel the performance of the obligations of that contract. If relator is entitled to immunity from a divorce suit in the state courts, the privilege is one which belongs to his home government, and is one which he cannot waive, and even though he should neglect to assert it in the first instance he would not be estopped from asserting it at any time before the litigation is ended. We are of the opinion, however,

that there is no such immunity in this character of controversy. The immunity exists if at all only by virtue of the constitutional provision and the acts of congress relating thereto. The United States Supreme Court in *Plaquemines Tropical Fruit Co. v. Henderson,* 170 U. S. 511, referring to this constitutional provision has said, at page 517:

> "It cannot be doubted that each of the original states had, prior to the adoption of the Constitution, complete and exclusive jurisdiction by its judicial tribunals over all legal questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction. * * * If it was intended to withdraw from the states authority to determine, by its courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, such a purpose would have been manifested by clear language. Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several states."

The language of paragraph 8 of Section 256 of the United States Judicial Code is in clear language, and yet it must be said that congress has not by that very clear language clearly manifested the legislative intent. The general intent of congress upon this entire subject is manifested by what is done and omitted rather than by what is said. By its omission to make any provision for the trial of divorce and alimony suits against foreign consuls in the federal courts it has manifested an intent and purpose to leave such controversies to the courts of the states.

The writ must be denied.

Writ denied.

DAY, ALLEN, KINKADE, ROBINSON, JONES and MATTHIAS, *JJ.*, concur.

Columbus, Ohio, Dec. 29th, 1928.

I hereby certify that the foregoing is a true and correct copy of the opinion in case No. 21357, The State of Ohio, ex rel. John C. Popovici, Vice Consul of Roumania, relator, v. Abram W. Agler, Charles Krichbaum and Edwin W. Diehl, Judges of the Court of Common Pleas, Stark County, Canton, Ohio, as the same is on file in this office; but the same is subject to revision and addition by the Judges until published in the official report.

J. L. W. HENNEY,
Reporter of the Supreme Court.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 11, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.